Supreme Court, U.S.
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91-1217

No.

In The

Supreme Court of the United States

October Term, 1991

FRATERNAL ORDER OF POLICE, LODGE NO. 5,

Petitioner,

vs.

CITY OF PHILADELPHIA, *et al.*,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Has the Third Circuit violated this Court's *City of Richmond v. J.A. Croson Co.*[1] ruling by approving a consent decree which:

(a) Imposes a racial hiring quota without adequate proof of discrimination;

(b) Imposes a racial hiring quota despite proof that the challenged practice furthers the employer's legitimate goals, and;

(c) Imposes a racial hiring quota which is not narrowly tailored?

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1. 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989).

PARTIES TO THE ACTION

Plaintiffs in the District Court, Appellees in the Court of Appeals, Respondents before this Court:

Thomas Freeman, Jr.; Michael E. Jordan; Rodney Ladson; The Guardian Civic League, Inc.[2]

Defendants in the District Court, Appellees in the Court of Appeals, Respondents before this Court:

City of Philadelphia; Orville W. Jones, Personnel Director

Intervenor-defendant in the District Court, Appellant in the Court of Appeals, Petitioner before this Court:

Lodge No. 5, Fraternal Order of Police[3]

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2. Petitioner believes that the Guardian Civic League, Inc. has neither parent nor subsidiary companies.

3. In the District Court Joseph Campana and Richard B. Costello were also granted permission to intervene as defendants. Neither was a party in the Court of Appeals.

TABLE OF CONTENTS

Page

Questions Presented for Review i

Parties to the Action ii

Table of Contents iii

Table of Citations iv

Opinions Below 1

Statement of Jurisdiction 2

Statutes and Regulations Involved 2

Statement of the Case 5

Reasons for Granting the Writ 8

I. The racial quota approved by the Court of Appeals violates this Court's decision in *City of Richmond v. J.A. Croson Co.* because it is not based upon adequate proof of discrimination. 8

II. The judgment of the Court of Appeals violates this Court's decision in *City of Richmond v. J.A. Croson Co.* because it imposes a racial hiring quota despite proof that the challenged practice furthers the employer's legitimate goals. 11

III. The racial quota approved by the Court of Appeals violates this Court's decision in *City of Richmond v. J.A. Croson Co.* because the quota is not narrowly tailored. 13

Contents

Page

Conclusion 15

TABLE OF CITATIONS

Cases Cited:

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989) ..i, 8, 11, 12, 13, 14

Fullilove v. Klutznick, 488 U.S. 448, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980) 14

General Electric Co. v. Gilbert, 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976)..... 9

Griggs v. Duke Power Co., 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971) 12

Johnson v. Transportation Agency, 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987).....9, 10, 11

Local No. 93, International Assn. of Firefighters v. City of Cleveland, 478 U.S. 501, 106 S. Ct. 3063, 92 L. Ed. 2d 405 (1986)..... 9

Main Line Paving v. Board of Ed., 725 F. Supp. 1349 (E.D. Pa. 1989) 14

Shurberg Broadcasting of Hartford, Inc. v. F.C.C., 876 F.2d 902 (D.C. Cir. 1989) 14

Skidmore v. Swift & Co., 323 U.S. 134, 65 S. Ct. 161, 89 L. Ed. 124 (1944) 9

Contents

Page

Steelworkers v. Weber, 443 U.S. 193, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979) 10

Statutes Cited:

24 U.S.C. § 1254(1) 2

28 U.S.C. § 1331(a) 5

28 U.S.C § 1343 5

28 U.S.C. § 2201 5

28 U.S.C. § 2202 5

42 U.S.C. § 1981 5

42 U.S.C. § 1983 5

42 U.S.C. § 1988 5

42 U.S.C. § 2000e-1 et seq. 5

42 U.S.C. § 2000e-5 5

Other Authorities Cited:

Black's Law Dictionary, Revised Fourth Edition (West Publishing Co. 1968) 10

Webster's New World Dictionary, Second College Edition (William Collins Publishers, Inc. 1979) 10

Contents

Page

Philadelphia Civil Service Regulation 9:067 3

Philadelphia Home Rule Charter:

§ 7-300 2

§ 7-401 3

28 C.F.R. § 50.14 et seq. 4

28 C.F.R. § 50.14(4)(D) 9

APPENDIX

Appendix A — Judgment Order of the United States Court of Appeals for the Third Circuit Dated October 24, 1991 ..... 1a

Appendix B — Memorandum of the United States District Court for the Eastern District of Pennsylvania Dated October 16, 1990 ..... 3a

Appendix C — Order and Final Judgment of the United States District Court for the Eastern District of Pennsylvania Dated October 16, 1990 ..... 23a

Appendix D — Order of the United States District Court for the Eastern District of Pennsylvania Dated April 16, 1991 ..... 39a

No.

In The

Supreme Court of the United States

October Term, 1991

FRATERNAL ORDER OF POLICE, LODGE NO. 5,

Petitioner,

vs.

CITY OF PHILADELPHIA, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner Fraternal Order of Police, Lodge No. 5 hereby petitions this Court for a writ of certiorari to review a judgment of the United States Court of Appeals for the Third Circuit, entered in this proceeding on October 24, 1991.

OPINIONS BELOW

The judgment of the Third Circuit Court of Appeals was entered on October 24, 1991, and is reproduced in the appendix

to this petition.[4] No separate opinion was issued by the Third Circuit. The October 16, 1990 opinion, order and appendix of the District Court for the Eastern District of Pennsylvania are also reproduced in the appendix,[5] as is the District Court's April 16, 1991 order denying petitioner's motion for new trial and motion to amend judgment.[6]

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on October 24, 1991. This Court's jurisdiction is invoked pursuant to 24 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

1. Philadelphia Home Rule Charter:

> § 7-300 — The purpose of the Civil Service Provisions of this Charter is to establish for the City a system of personnel administration based on merit principles and scientific methods covering the appointment, promotion, demotion, transfer, layoff, removal and discipline of its employees and other incidents of City employment. All appointments and promotions to positions in the Civil Service shall be made in accordance with the Civil Service Regulations.

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4. Appendix at 1a-2a.

5. Appendix at 3a-38a. The District Court's opinion, order and appendix now appears at 751 F. Supp. 509 (1990). The District Court sets forth the consent decree at issue in this case. Appendix at 23a-38a (751 F. Supp. at 519-525).

6. Appendix at 39a.

§ 7-401 — The [Civil Service] Regulations shall provide for:

(c) Open competitive examinations to test the relative fitness of applicants for the respective positions . . . .

(f) The establishment of eligible lists for appointment and promotion, upon which lists shall be placed the names of successful candidates in the order of their relative excellence in the respective examinations. Such lists shall continue in force for at least one year from the date of their establishment and thereafter until exhausted or replaced by more recently prepared lists but in no case longer than two years . . . .

(h) For the certification of the two persons standing highest on the appropriate eligible list to fill a vacancy . . . .

2. **Philadelphia Civil Service Regulations:**

9.067 — RANK ON ELIGIBLE LISTS. Rank on an eligible list shall be in order of relative excellence in the examination as determined by the final passing average grade plus, in the case of an open competitive list, credits authorized by law for veterans preference, or, in the case of a promotional list, plus credits as prescribed by the Regulations for performance ratings and seniority.

3. Uniform Guidelines on Employee Selection Procedure (1978), 28 C.F.R. § 50.14 *et seq.*:

> 50:14(4)(D) — *Adverse impact and the "four-fifths rule."* A selection rate for any race, sex or ethnic group which is less than four-fifths (4/5)(or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact. Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms or where a user's actions have discouraged applicants disproportionately on grounds of race, sex or ethnic group. Greater differences in selection rate may not constitute adverse impact where the differences are based on small numbers and are not statistically significant, or where special recruiting or other programs cause the pool of minority or female candidates to be atypical of the normal pool of applicants from that group. Where the user's evidence concerning the impact of a selection procedure indicates adverse impact but is based upon numbers which are too small to be reliable, evidence concerning the impact of the procedure over a longer period of time and/or evidence concerning the impact which the selection procedure had when used in the same manner in similar circumstances elsewhere may be considered in determining adverse impact. . . .

STATEMENT OF THE CASE

This is a declaratory judgment class action brought on behalf of two classes of Afro-Americans who took the written examination required to enter the Philadelphia Police Academy. The complaint requested declaratory and injunctive relief, as well as compensation for pain, suffering and lost wages suffered by certain plaintiffs, together with an award of counsel fees.[7] The action was commenced in the U.S. District Court for the Eastern District of Pennsylvania on April 5, 1990. On June 21, 1990 the District Court permitted Fraternal Order of Police, Lodge No. 5, (hereafter "F.O.P."), Richard B. Costello and Joseph Campana to intervene as party defendants. The hearing to approve the settlement, by consent decree, of the class action was held on September 12, 1990. On October 16, 1990 the District Court entered a memorandum and order approving the consent decree, entering it as a final judgment. The F.O.P. filed post trial motions, which were denied on April 16, 1991. The F.O.P. appealed to the Third Circuit Court of Appeals, which on October 24, 1991 issued its judgment order affirming the District Court's judgment.

The case centers around the written examination given to applicants for the Philadelphia Civil Service position of police officer recruit. The Philadelphia Home Rule Charter requires that all civil service positions be filled from "eligible lists" of candidates. Candidates are ranked on these lists in order of their scores on written examinations administered for the various civil service positions. The written examination for police officer recruit

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7. The action was based upon Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-1 *et seq.*, and upon the Civil Rights Acts of 1866 and 1871, 42 U.S.C. § 1981 and § 1983, respectively. Jurisdiction in the District Court was invoked under 28 U.S.C. § 2201, § 2202, § 1331(a) and § 1343; and upon 42 U.S.C. § 1981, § 2000e-5 and § 1988. As to their Title VII claims plaintiffs invoked the preliminary injunctive relief procedure set forth in § 706 of the Act.

thus serves two purposes; it is the initial screening device for entrance into the police academy, as failure to pass the test ends further consideration of the applicant for the position. The examination also determines, by reason of its rank ordering, how soon an applicant who passes the test (and all of the subsequent screening tests, which include medical, psychiatric, drug and background investigation) will be accepted into the academy.[8] Because the eligible lists expire after a period of years, it is possible that a low-scoring applicant will never be admitted to the academy.[9]

In the past two decades the written test has been challenged by Afro-Americans and by Hispanics. The litigation culminated in various consent decrees, which have now expired. As a result of these decrees the City engages in an elaborate process to create the tests, involving review of the test questions by independent authorities. No effort was made in the proceedings below to demonstrate that the test intentionally discriminates against minorities, *e.g.*, that somehow the exam questions are phrased in a manner which would mislead minorities, or that the correct answers to the questions are better known to non-minorities. Rather, the case was presented as a discriminatory impact claim;

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8. Thus the two plaintiff classes represented in this action. The first class represents black applicants who failed the written examination. The second class represents black applicants who passed the examination but who ranked too low on the pertinent eligibility list to be selected for the *first* classes of police officer recruits.

9. It appears, however, that this is ordinarily unlikely for the police officer recruit position, and the class of plaintiffs who passed the examination made no claim that they would not be admitted to the academy. This seems to be due to the attrition which occurs in the post-examination screening. Police Commissioner Williams testified that nine or ten applicants are eliminated in these stages for every one who passes. Thus, the fact that plaintiff Jordan ranked 3481 of 3487 persons on the January, 1990 eligible list may be misleading. If he were to survive the background and other checks, he might be one of the 300-odd "final" candidates for the academy.

for unknown reasons, blacks fail the exam at a greater rate than do whites, and also tend to have lower passing scores than whites have.

The "remedy" for this "discrimination" which the City and the plaintiffs rapidly agreed to[10] is contained in the consent decree. In its salient features, the consent decree prohibits the city from utilizing any test which blacks pass at a lower rate than the "passing rate of applicants in the racial group having the highest passing rate," or which places a smaller percentage of blacks in the top 1000 spots on the eligibility list than the percentage of blacks who pass the exam.[11] There are two exceptions to this general prohibition. First, if the District Court finds that the exam validly predicts the job performance of police officers (not police recruits), then the City may use the exam regardless of its racial impact. Second, the City may use the exam if the City also adheres to the hiring quota established by paragraph 8 of the consent decree.[12] Because the City has demonstrated no inclination to spend several hundred thousand dollars on a validation study, and because two decades of experimentation has failed to yield a test which does not have a disparate impact on blacks,[13] it appears likely that this hiring quota will be in force into the 21st Century.[14]

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10. The suit was filed April 5, 1990. By July 17 the City and the plaintiffs had agreed to the *final* version of the consent decree, which was submitted to the District Court that date.

11. This literally means that if 80% of black applicants pass the exam, then 80% of the top 1000 positions of the eligibility list must be held by blacks, or the test will be prohibited by the consent decree. See Paragraph 6 of the consent decree, at Appendix pages 30a-31a (751 F. Supp. at 521-522).

12. The exceptions are also set forth in paragraph 6 of the consent decree.

13. Nevertheless, paragraph 12 of the consent decree requires the City to keep trying to find such a test. Appendix at 33a-34a (751 F. Supp. at 523).

14. The consent decree has a ten-year duration.

The hiring quota, then, is the central feature of this appeal. It is set forth in Paragraph 8(a) of the consent decree, and is set forth here:

> 8.(a) During the duration of this Consent Order, the appointment of Afro-Americans to the position of Police Officer Recruit (or equivalent entry level position) shall be at least at the same rate as the percentage that Afro-Americans are of test applicants. (Applicants shall hereinafter mean test takers.) That is, for each 100 candidates appointed by the City as Police Officer Recruit, the number of Afro-American appointments shall always equal at least the percentage that Afro-Americans were of all applicants who took the test multiplied by 100.

The consent decree does not address the examination's disparate impact, if any, on other racial minorities.

REASONS FOR GRANTING THE WRIT

I.

The racial quota approved by the Court of Appeals violates this Court's decision in *City of Richmond v. J.A. Croson Co.*[15] because it is not based upon adequate proof of discrimination.

To justify a racial hiring quota, such as that imposed by the consent decree in this case, *Croson* requires a demonstration of past discrimination. This is a disparate impact case, where no proof of racial animus or intentional discrimination was presented. While evidence of disparity was introduced, the disparity was not

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15. 488 U.S. 469, 109 S. Ct. 706, 102 L. Ed. 2d 854 (1989).

shown to rise to the level of discrimination.

The difference in passing rates was not great enough to indicate a disparate impact of a magnitude arising to discrimination. Federal guidelines do not assume a discriminatory impact when a selection rate for any race is greater than four-fifths of the rate for the group with the highest rate.[16] The District Court found that the pass rate of blacks was approximately 82% of the pass rate of whites. Under the Uniform Guidelines, therefore, there was simply no discriminatory impact. While the Guidelines do not have the force of law, they do "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[17]

The District Court avoided the application of this standard by utilizing language from *Johnson v. Transportation Agency,*[18] to the effect that, in judging the validity of voluntarily-instituted affirmative action programs, a showing of a "manifest imbalance," rather than a prima facie case against the employer, is sufficient to support the consent decree.[19] This is a misreading of *Johnson*. The word "manifest" implies a more obvious, and

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16. Uniform Guidelines, 28 C.F.R. § 50.14(4)(D).

17. *Local No. 93, International Assn. of Firefighters v. City of Cleveland,* 478 U.S. 501, 518, 106 S. Ct. 3063, 3073, 92 L. Ed. 2d 405 (1986), citing *General Electric Co. v. Gilbert,* 429 U.S. 125, 142, 97 S. Ct. 401, 411, 50 L. Ed. 2d 343, (1976), in turn citing *Skidmore v. Swift & Co.,* 323 U.S. 134, 140, 65 S. Ct. 161, 164, 89 L. Ed. 124 (1944).

18. 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987).

19. *See* Appendix at pages 14a-15a (751 F. Supp. at 516) and at pages 19a-20a (751 F.Supp. at 518). While respondent-plaintiffs have maintained that they did present a *prima facie* case, the District Court appears not to have accepted this; otherwise its detailed discussion of "manifest imbalance" was wholly unnecessary.

greater, imbalance than a simple prima facie showing.[20] In *Johnson* the "manifest imbalance" arose from the fact that women constituted 36.4% of the area labor force but only 22.4% of the employer's workers, and none held jobs in the classifications relevant to that case. In *Steelworkers v. Weber,* 443 U.S. 193, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979), which apparently coined the "manifest imbalance" term,[21] blacks composed 39% of the area work force but less than two percent of the employer's craftworkers. There was no such obvious — or "manifest" — imbalance here.[22] Further, the "manifest imbalance" standard is not designed to provide a more easily achieved proof of discrimination to support voluntary affirmative action programs. It is, instead, an alternative means of analyzing discrimination in industries where the discrimination has been most effective, *i.e.*, where comparisons between the *job-qualified* labor market

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20. *Webster's New World Dictionary,* Second College Edition (William Collins Publishers, Inc. 1979) defines "manifest" as: "1. to make clear or evident; show plainly; reveal; evince." The same dictionary defines "prima facie" as: "at first sight; on first view, before further examination." The distinction is greater according to the definitions in *Black's Law Dictionary,* Revised Fourth Edition (West Publishing Co. 1968): "manifest" is therein defined as: "Evident to the senses, especially to the sight, obvious to the understanding, evident to the mind, not obscure or hidden, and is synonymous with open, clear, visible, unmistakable, indubitable, indisputable, evident, and self-evident . . . . In evidence, that which is clear and requires no proof; that which is notorious." The same dictionary defines "prima facie" as: "At first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary."

21. And which used the word "conspicuous" interchangeably with the word "manifest".

22. Indeed, the figures are close enough that there may be no imbalance at all if veterans preference points are factored into the figures supplied to the District Court. It is not known whether the figures utilized in the District Court's opinion were so adjusted.

and the minority employees cannot be made because there are no, or few, job-qualified minorities in the general labor market.[23] Thus, there was simply not an adequate statistical basis in this case to support a finding of past discrimination;[24] and statistical evidence was essentially the only evidence presented. The Third Circuit has thus approved a racial hiring quota in violation of this Court's *Croson* requirements.

II.

The judgment of the Court of Appeals violates this Court's decision in *City of Richmond v. J.A. Croson Co.* because it imposes a racial hiring quota despite proof that the challenged practice furthers the employer's legitimate goals.

An examination's disparate impact is permissible if the examination "is predictive of or significantly correlated with important elements of work behavior which comprise or are

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23. *See* footnote 10 of the *Johnson* opinion, which analyses the distinction between the "manifest imbalance" and the "prima facie case" standards in some detail.

24. It should be noted that the term "statistically significant" signifies only that the relationship is not likely to have occurred by chance. In the present case the term has assumed overtones implying past discrimination by the City (as in District Court's opinion at appendix page 17a (751 F. Supp. 517): "The uncontradicted evidence shows that such a statistically significant imbalance exists, that the test has not been validated, and that there is a substantial question about whether it ever can be validated. As such, the Court concludes that race-conscious measures are warranted to remedy conspicuous racial disparities in the police officer recruit selection process"). The term itself has no such implication; the "statistically significant" imbalance may have been caused by any of a wide variety of factors, such as educational, age or experience differences. Indeed, sorting out the multitude of non-discriminatory factors is the foremost problem with validation of the test.

relevant to the job or jobs for which candidates are being evaluated." *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S. Ct. 849, 28 L. Ed. 2d 158 (1971). Much was made of the fact that no study had validated the police examination as a predictor of performance as a *police officer*. This was the wrong comparison. The proper question should be whether the examination validly predicts performance at the police academy, for the exam is only utilized to rank applicants for entry into the academy. Quite clearly, on the basis of the evidence presented to the District Court, the exam is a valid predictor of police academy performance, since the District Court found that "the academy has an overall failure rate of less than one percent."[25] Passing the exam is incontrovertibly predictive of success at the academy,[26] and the exam is therefore appropriately validated.

No post-*Croson* case requires the employer to conclusively prove that a selection device is absolutely required in order to advance employer goals. Might the City utilize a different examination as a screening device? Perhaps. But the law does not require the City to use the best test, or any particular test at all. The law requires only that there be evidence that the current exam furthers success at the academy, and this proof was presented.[27] The Third Circuit now appears to require a validation study for any test which both further's employer goals and has a discriminatory impact. This is in conflict with *Croson*.

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25. Appendix page 12a (751 F. Supp. at 515).

26. The comparison with the SAT is obvious. The college entrace examination simply predicts success in college, not in the jobs performed after graduation.

27. The fact that the examination validly predicts performance at the academy, rather than performance as a police officer, does not mean that the exam does not significantly further the employer's legitimate employment goals. Success at the academy is obviously a desirable goal.

III.

The racial quota approved by the Court of Appeals violates this Court's decision in *City of Richmond v. J.A. Croson Co.* because the quota is not narrowly tailored.

Croson requires that the remedy for past discrimination be narrowly tailored. The decree approved by the Court of Appeals is prematurely imposed, overly broad in its scope and not rationally related to the ends it seeks to achieve.

First, *Croson* requires "consideration of the use of race-neutral means" of rectifying prior discrimination. The consent decree itself demonstrates that such measures exist. Section IX of the consent decree[28] commits the City to conduct training sessions for the examination. This is a race-neutral means which quite probably, in itself, could remedy whatever racial imbalance exists in exam pass rates. Inclusion of these provisions in the consent decree presumably indicates both plaintiffs' and the City's belief that the training sessions will be effective. Under *Croson*, therefore, the training sessions should be conducted *prior* to, rather than concurrently with, establishment of a racial quota system. Similarly, Section VIII of the consent decree[29] obligates the City to develop a new examination which minimizes adverse impact on minorities and which can be validated. Again, *Croson* requires this race-neutral measure to be tried before implementation of a racial quota system.[30]

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28. Appendix page 34a (751 F. Supp. at 523).

29. Appendix pages 33a-34a (751 F. Supp. at 523).

30. If, in fact, plaintiffs, the City, the District Court and the Court of Appeals believe that such an exam is not a likely possibility, then there should be no place for this provision of the consent decree, as it commits the City to an expensive program of needless waste.

Second, "a racial preference plan must allow for case-by-case consideration of applicants to ensure that each beneficiary of the plan has in fact been the victim of past discrimination."[31] There is no provision in the consent decree to comply with this requirement. For example, the consent decree does not provide blacks who fail the test, and may thus be the chief victims of its "discriminatory impact," any means of being placed on the eligible list. The City might easily fill its quota from blacks who pass the test, and simply give additional tests and create new eligible lists to keep the quota filled.[32]

Third, no goal is established. The consent decree simply continues for ten years, unless the City obtains court approval of a validated exam or ceases to give the exam entirely.

Fourth, the quota established by the consent decree is subject to manipulation and will not necessarily ameliorate the discriminiatory practice. The City is required to hire black police officers in the same proportion as blacks who take (not pass) the examination. The quota can be manipulated simply by packing the examination with racial groups (black or white) who need merely to take the exam, not pass it, to establish the quota. Logically, in fact, the quota formula need not result in more blacks being selected as police recruits. If, for example, 1000 whites and 100 blacks take the exam, black representation will be diminished from its current levels.[33] Because the quota is logically unrelated

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31. *Main Line Paving v. Board of Ed.*, 725 F. Supp. 1349, 1361 (E.D. Pa. 1989), citing *Shurberg Broadcasting of Hartford, Inc. v. F.C.C.*, 876 F.2d 902 (D.C. Cir. 1989), *Croson, supra*, and *Fullilove v. Klutznick*, 488 U.S. 448, 100 S. Ct. 2758, 65 L. Ed. 2d 902 (1980).

32. *See* paragraph 8(d) of the consent decree, at Appendix page 32a (751 F. Supp. 522), which provides for just this eventuality.

33. Paragraph 8(a) of the consent decree requires only that "[d]uring the (Cont'd)

to curing the discriminatory practice, and because the formula is subject to abuse, the consent decree cannot be considered to be "narrowly tailored" to remedy prior discrimination. It is therefore invalid. Yet it will be used as a guide to future cases in the Third Circuit if the Court of Appeals' judgment is left intact.

CONCLUSION

For the foregoing reasons petitioners respectfully request this Court to grant this petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted

JOHN K. WESTON
SACKS, BASCH, WESTON
& SACKS
Attorneys for Petitioner

(Cont'd)
duration of this Consent Order, the appointment of Afro-Americans to the position of Police Officer Recruit (or equivalent entry level position) shall be at least at the same rate as the percentage that Afro-Americans are of test applicants." Appendix page 31a (751 F. Supp. at 522).

APPENDIX A — JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED OCTOBER 24, 1991

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1417

THOMAS FREEMAND, JR., ET AL.,

Appellees,

v.

CITY OF PHILADELPHIA; ORVILLE W. JONES, in his official capacity as the duly appointed PERSONNEL DIRECTOR for the CITY OF PHILADELPHIA;

FRATERNAL ORDER OF POLICE LODGE #5 and JOSEPH CAMPANA;

Intervenors in District Court,

FRATERNAL ORDER OF POLICE, LODGE NO. 5,

Intervenor,

Appellant.

Appeal from United States District Court
for the Eastern District of Pennsylvania
D.C. Civil Docket No. 90-2356
(District Judge: Honorable Raymond J. Broderick)

Appendix A

Argued: October 17, 1991

Before: STAPLETON, SCIRICA and ROTH, *Circuit Judges*

JUDGMENT ORDER

After consideration of all contentions raised by appellant,

IT IS ADJUDGED AND ORDERED that the judgment of the district court be and is hereby AFFIRMED.

Costs to be taxed against appellant.

BY THE COURT.
s/ Illegible
Circuit Judge

Attest:

s/ Sally Mrvos
Sally Mrvos, Clerk

Costs taxed in favor of the City of Phila., as follows:

Brief $63.00

Certified as a true copy and issued in lieu
of a forman mandate on November 15, 1991

Test:
s/ Sally Mrvos

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX B — MEMORANDUM OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED OCTOBER 16, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 90-2356

THOMAS FREEMAN, JR., MICHAEL E. JORDAN, RODNEY LADSON, individually and on behalf of ali others similarly situated, and THE GUARDIAN CIVIC LEAGUE, INC.

v.

CITY OF PHILADELPHIA, ORVILLE W. JONES, in his official capacity as the duly appointed PERSONNEL DIRECTOR FOR THE CITY OF PHILADELPHIA, FRATERNAL ORDER OF POLICE, LODGE NO. 5, and JOSEPH CAMPANA

MEMORANDUM

BRODERICK, J. October 16, 1990

The individual plaintiffs, along with defendants City of Philadelphia and its Personnel Director (City defendants), seek judicial approval of a proposed Consent Order designed to settle this action, which assails as racially discriminatory the City's written examination for police officer recruits. The Court convened a hearing on September 12, 1990 to consider whether the settlement is fair, adequate, and reasonable. For the reasons that follow, the Court will approve the proffered Consent Order.

Appendix B

To obtain the Philadelphia civil service position of police officer recruit, a person must satisfy various requisites. An applicant must be between eighteen and thirty-six years old, be a high school graduate or equivalent, and have been a Philadelphia resident for at least one year. A written preemployment examination, periodically administered, serves as the initial screening device. The City establishes an eligibility list, which, based on raw exam scores, arranges candidates in numerical order from the highest passing score to the lowest passing score. Only those who are certified on this rank-order list and who obtained a sufficiently high ranking in light of the number of positions open receive further consideration. Medical and psychiatric evaluations, drug tests, polygraph examinations, and background investigations follow. Applicants who navigate all these requirements then enter a graded nineteen-week training program at the Police Academy. After graduation from the Academy and upon the expiration of an on-the-job probationary period, police recruits become officers. At this time, approximately twenty-two percent of all police officers are black.

For a full understanding of the context of this litigation, one must look to two prior suits in which minority groups challenged the hiring, screening, and promotion procedures utilized by the Philadelphia Police Department. In 1970, classes of black plaintiffs instituted a broad-based attack on the Police Department's employment practices. Some two years after the suit was initiated and after extensive hearings, the district court held that the then-used entrance examination had a disparate impact upon blacks and was not validated as job-related. *Commonwealth of Pennsylvania v. O'Neill,* 348 F. Supp. 1084 (E.D. Pa. 1972), *aff'd in part*, 473 F.2d 1029 (3d Cir. 1973). In consequence, the City sought the assistance of Educational Testing Service (ETS) to create and validate a new written exam. Several more rounds of litigation,

focusing on other dimensions of the hiring and promotion process, ensued. Fourteen years after the action was brought, the parties finally submitted, and the court approved, a consent decree. The consent decree committed the defendants to continue retention of ETS (or a similar organization) for purposes of developing a non-discriminatory examination. 100 F.R.D. 354, 362 (E.D. Pa. 1983), *aff'd mem.*, 746 F.2d 1465 & 1466 (3d Cir. 1984). It also provided that the City, in order to correct the disparate effects of the entrance test, would hire a specified number of black applicants, in addition to those selected in rank order. *Id.* at 357.

Beginning in 1977, classes of Hispanic applicants charged that the City's written exam, prepared with the help of ETS and administered in 1975 and 1978, contravened federal and state law because it discriminated against them. *Alvarez v. City of Philadelphia* 98 F.R.D. 286, 288 (E.D. Pa. 1983). The *Alvarez* court heard considerable expert testimony about the ability of the tests to predict future performance, but, before the court rendered a decision, the parties entered into a consent decree, which was approved on May 21, 1984. The order bound the City to hire a certain number of Hispanic officers and to expend its best efforts to utilize a non-discriminatory examination.

The plaintiffs in this case assert that Philadelphia's current written examination for the position of police officer recruit unlawfully discriminates against blacks in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-1 *et seq.*, the Civil Rights Act of 1871, 42 U.S.C. § 1983, and the Civil Rights Act of 1866, 42 U.S.C. § 1981. In their complaint, they sought, among other forms of relief, a permanent injunction barring use of the ostensibly illegal test. The Court permitted the Fraternal Order of Police (FOP) and Joseph Campana to intervene as party-defendants.

Appendix B

The plaintiffs and the City subsequently filed a joint motion for class action certification. By Order dated July 17, 1990, the Court certified two plaintiff classes. The first class, represented by Thomas Freeman, Jr. and Rodney Ladson, encompasses all Afro-American applicants for the police officer recruit position who had failed the written examination given on December 16, 1989 or June 23, 1990. The second group of plaintiffs, represented by Michael E. Jordan, includes all AfroAmerican applicants for police officer recruit who received passing scores on the December or June test, but who, because of the City's utilization of a rank-order eligibility list were not selected for appointment to the first classes of police officer recruits.

At the same time, because the plaintiffs and the City defendants had submitted a proposed Consent Order, the Court approved a notice of hearing on the proposed settlement pursuant to Federal Rule of Civil Procedure 23. The notice summarized the terms of the proffered Consent Order, stated that the Court had scheduled a hearing to consider its appropriateness, and allowed any individual "affected" by its terms to file written comments in support of or in opposition to the Consent Order. The notice was mailed to all identified persons who took the December l6th or June 23d examination and was published in three newspapers with large circulations in the Philadelphia area.

II.

The proposed Consent Order forbids the City from certifying an eligibility list based on written exam scores if black applicants have a pass rate statistically significantly lower than the racial group having the highest pass rate or if the percentage of blacks in the top one thousand test-takers on the eligibility list is statistically significantly less than the percentage of blacks who

pass the test. The City may utilize such a list only if the Court finds after a hearing that the test and its scoring method validly predict future job performance or if the City appoints black applicants to the police recruit position at least at the same rate as the percentage of blacks who take the test. This latter stricture applies, however, only if the examination is, as now, given on a periodic basis. In the event the City adopts a process of continuous testing, the appointment rate of blacks to the police officer recruit position will be based on the percentage that black test-takers are of all test-takers during the preceding six months.

The Consent Order obliges the City to solicit and evaluate proposals for a new police officer recruit exam which minimizes adverse impact on nonwhites and which can be validated. For each test given, the City must conduct at least one session to assist prospective applicants in preparing for it. The Consent Order also contains several reporting requirements.

At the hearing and by way of supplemental materials, [1] evidence was introduced in support of the settlement. The plaintiffs' theory of the case is that the written examination, though a facially neutral screening device, has a statistically significant and unjustifiable disparate impact on blacks. There is no doubt that Title VII reaches employment practices that are "fair in form, but discriminatory in operation," *Griggs v. Duke Power Co.*, 401 U.S. 424, 431, 91 S. Ct. 849, 853, 28 L. Ed. 2d 158 (1971), even without proof of racial animus behind their use. *Wards Cove Packing Co. v. Atonio*, ___ U.S. ___, ___, 109 S. Ct. 2115,

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1. The Court made a request for further evidence during a telephone conference, in which all named litigants participated. At that time, the Court emphasized that copies of the additional exhibits should be sent to the FOP's counsel and that the FOP had the right to object to the introduction of the documents. The Court has not received any objections to date.

2118-19, 104 L. Ed. 2d 733 (1989); *Washington v. Davis*, 426 U.S. 229, 246-47, 96 S. Ct. 2040, 2051, 48 L. Ed. 2d 597 (1976).

Indeed, Congress, in promulgating the 1972 amendments to Title VII, specifically extended the Act to protect minorities against written examinations that create artificial barriers to job opportunities in state and municipal governments. *Connecticut v. Teal*, 457 U.S. 440, 448-49, 102 S. Ct. 2525, 2531-32, 73 L. Ed. 2d 130 (1982). An employer may continue to utilize a job criterion which has a detrimental effect on members of a particular racial group, however, if it is justified by business necessity, that is, if the criterion is "'predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 431, 95 S. Ct. 2362, 2378, 45 L. Ed. 2d 280 (1975) (quoting EEOC Uniform Guidelines, 29 C.F.R. § 1607.4(C)). *Accord Croker v. Boeing Co.*, 662 F.2d 975, 991 (3d Cir. 1981) (in banc). Even so, a plaintiff still may prevail if "he shows that the employer was using the [exclusionary] practice as a mere pretext for discrimination," *Teal*, 457 U.S. at 447, 102 S. Ct. at 2530, by demonstrating, for example, that other procedures, "without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'" *Albemarle*, 422 U.S. at 425, 95 S. Ct. at 2375 (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801, 93 S. Ct. 1817, 1823, 36 L. Ed. 2d 668 (1973)).

A City official testified that Philadelphia's Personnel Department, Test Development Division, creates the questions for police officer recruit entry examinations. An outside consultant then reviews the draft items and either blesses or revises them. ETS ceased this oversight function during 1987, apparently in

response to a Justice Department probe and lawsuit which centered on the racially discriminatory effects of the ETS police hiring exam. *See United States v. Suffolk County*, 49 Empl. Prac. Dec. (CCH) ¶ 38,793 (E.D.N.Y. 1988). A professor of psychology, who was retained after that time, assisted the City in formulating the December and June examinations at issue. Except for differences introduced for security reasons, the two exams are the same. The City has done disparate impact analyses of its present test, but has never properly validated it.

The parties stipulated to the relative pass-fail rates of blacks and whites who took the December and June tests. That information showed:

December 1989 Examination

	Total no. of test-takers	Passed	Failed	% Failed
White	1654	1552	102	6.2

June 1990 Examination

	Total no. of test-takers	Passed	Failed	% Failed
White	626	601	25	4.0
Black	673	553	120	17.8

December and June Examinations Combined

	Total no. of test-takers	Passed	Failed	% Failed
White	2280	2153	127	5.6
Black	2793	2205	588	21.1

Appendix B

On the basis of this data, the plaintiff's expert testified that for the two exams, taken together or separately, the failure rate of black test-takers was statistically significantly higher than that of white test-takers and that the adverse impact was not likely to have occurred by chance. No one produced any evidence to contradict this conclusion.

The racial imbalance between the raw test scores of blacks and whites who passed the test is also apparent. The practical consequence of this is that fewer blacks are selected for further processing. For example, of the 200 individuals who obtained the highest raw scores on the December and June tests combined, 163 were white and only 23 were black, even though blacks constituted a majority of test-takers. The following tables show a similar pattern of racial disparity with respect to the scores of others who were successful on the test.

December Examination Passers

Raw Score	All Cases	No. White	No. Black
99-100	142	112	19
96-98	540	351	153
93-95	574	307	224
90-92	513	245	227
87-89	455	184	229
84-86	391	120	240
81-83	363	105	216
78-80	280	76	173
75-77	249	50	171

Appendix B

June Examination Passers

Raw Score	All Cases	No. White	No. Black
99-100	58	51	4
96-98	202	140	47
93-95	220	125	65
90-92	191	97	76
87-89	148	59	78
84-86	143	48	85
81-83	141	36	88
78-80	104	22	70
75-77	73	20	40

December and June Examination Passers Combined

Raw Score	All Cases	No. White	No. Black
99-100	200	163	23
96-98	742	491	200
93-95	794	432	289
90-92	704	342	303
87-89	603	243	307
84-86	534	168	325
81-83	504	141	304
78-80	384	98	243
75-77	322	70	211

As noted earlier, the entrance test has never been validated. The plaintiffs submitted some anecdotal evidence that suggests the exam is not a satisfactory predictor or evaluator of work-related behaviors. Police Commissioner Willie Williams stated that when he had served as Inspector of the Department's Training Bureau in 1988 he discerned no correlation between the rank-order test performance of recruits and their academic success at

the Academy. His conclusion is partially buttressed by the fact that the Academy has an overall failure rate of less than one percent. Additionally, Detective Ronald Oliver, a police veteran of twenty-one years and president of the Guardian Civic League, testified that, in his experience, written test scores do not appear to reflect on-the-job competence. Both witnesses expressed the view that the proffered Consent Order would not have a deleterious effect on the quality of the force.

III.

A.

The standard for approval of a proposed class action settlement is well established. The reviewing court must find that the submitted agreement is "fair, adequate, and reasonable," *Walsh v. Great Atlantic & Pacific Tea Co.*, 726 F.2d 956, 965 (3d Cir. 1983), or, stated negatively, that its terms are "not unlawful, unreasonable, or inequitable." *United States v. City of Jackson*, 519 F.2d 1147, 1151 (5th Cir. 1975). The Third Circuit has articulated several factors to guide this inquiry. These include the "complexity, expense and likely duration of the litigation," "the reaction of the class to the settlement," "the stage of the proceedings and the amount of discovery completed," the risks of establishing liability and securing relief, "the risks of maintaining the class action through the trial," the defendant's capacity to afford greater relief, and "the range of reasonableness of the settlement" to a possible recovery "in light of all the attendant risks of litigation." *Girsh v. Jepson*, 521 F.2d 153, 157 (3d Cir. 1975) (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 463 (2d Cir. 1974)); *see also Bryan v. Pittsburgh Plate Glass Co.*, 494 F.2d 799 (3d Cir.), *cert. denied*, 419 U S. 900 95 S. Ct. 184, 42 L. Ed. 2d 146 (1974).

This standard possesses a special content, however, when a consent decree, offered to terminate Title VII litigation, includes race-conscious remedial provisions. Congress undoubtedly assigned a high premium on the voluntary settlement of Title VII disputes, regardless of whether an actual lawsuit has begun. *Johnson v. Transportation Agency*, 480 U.S. 616, 630, 107 S. Ct. 1442, 1451, 94 L. Ed. 2d 615 (1987); *Firefighters v. Cleveland*, 478 U.S. 501, 515, 106 S. Ct. 3063, 3071, 92 L. Ed. 2d 405 (1986); *Carson v. American Brands, Inc.*, 450 U.S. 79, 88 n.14, 101 S. Ct. 993, 998 n.14, 67 L. Ed. 2d 59 (1981); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 44, 94 S. Ct. 1011, 1017, 39 L. Ed. 2d 147 (1974); 28 C.F.R. § 50.14(17). Thus, some courts have indicated, a presumption of validity attaches to proposed consent decrees in employment discrimination cases. *See, e.g., United States v. City of Alexandria*, 614 F.2d 1358, 1362 n.10 (5th Cir. 1980). On the other hand, when the consent decree does not merely memorialize a compromise between litigants, but, by virtue of its injunctive provisions, operates prospectively and implicates the interests of other individuals, the court must scrutinize the agreement "carefully" to ensure that it does not violate federal law or generate "unreasonable [or] proscribed" effects on third parties. *Williams v. City of New Orleans*, 729 F.2d 1554, 1559-60 (5th Cir. 1984) (in banc); *see also EEOC v. AT&T*, 556 F.2d 167, 174 (3d Cir. 1977), *cert. denied*, 438 U.S. 915, 98 S. Ct. 3145, 57 L. Ed. 2d 1161 (1978); *Patterson v. Newspaper & Mail Deliverers' Union*, 514 F.2d 767, 771 (2d Cir. 1975), *cert. denied*, 427 U.S. 911, 96 S. Ct. 3198, 49 L. Ed. 2d 1203 (1976); O'Neill, 100 F.R.D. at 356. As a result, the Court, before approving the consent decree, must conclude "that the proposal represents a reasonable factual and legal determination based on the facts of record, whether established by evidence, affidavit, or stipulation." *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (in banc) (plurality opinion)).

Phrased differently, the appropriate benchmark by which to evaluate the propriety of race-conscious measures contained in a consent decree is whether the employer could have implemented those measures on its own initiative, outside the context of litigation. *See Firefighters*, 478 U.S. at 512-13, 106 S. Ct. at 3070, *aff'g Vanguards v. Cleveland*, 753 F.2d 479, 483 (6th Cir. 1985). A public entity may, consistent with Title VII, voluntarily adopt an employment plan containing racial classifications if that program is designed to further a legitimate remedial purpose, such as the elimination of a "manifest racial imbalance," and if it implements that purpose by means which neither "unnecessarily trammel the interests" of other racial groups nor create "an absolute bar" to their employment opportunities. *Johnson*, 480 U.S. at 630, 107 S. Ct. at 1451 (quoting *Steelworkers v. Weber*, 443 U.S. 193, 99 S. Ct. 2721, 61 L. Ed. 2d 480 (1979)).

The quantum and type of proof necessary to sustain a voluntary affirmative action program is different than that needed to authorize court-ordered remedies. The evidence of disparity offered to justify the remedial provisions of the agreement need not be "such to support a prima facie case against the employer" or even an "'arguable violation' on its part." *Johnson*, 480 U.S. at 630, 632, 107 S. Ct. at 1451, 1452. *Accord* Rutherglen & Ortiz, *Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 UCLA L. Rev. 467, 471, 503-18 (1988); Boyd, *Affirmative Action in Employment — The Weber Decision*, 66 Iowa L. Rev. 1, 10-12, 23-24 (1980). To impose a more stringent requirement for consent decree approval would collapse the "fundamental" distinction between volitional behavior by an employer and the exercise of coercion by the judiciary, *Johnson*, 480 U.S. at 631 n.8, 107 S. Ct. at 1452 n.8, and, more importantly, would derogate from Congress' "desire to preserve a relatively large domain for voluntary employer action." *Id.;*

see also id. at 632-33 & n.10, 107 S. Ct. 1452-53 & n.10; *Firefighters*, 478 U.S. at 525-26, 106 S. Ct. at 3077; *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 106 S. Ct. 3019, 92 L. Ed. 2d 344 (1986).

B.

The proposed Consent Order survives scrutiny. First, the sum of the *Girsh* factors militate in favor of approval. Litigating this case to judgment would be, for both sides, a costly and time-consuming proposition. The parties would have to retain experts to evaluate statistical data and testify at trial. The City defendants would have to complete a validation study of its testing procedure. Not only would a validation study of its current exam entail great expense (of at least several hundred thousand dollars, according to one Philadelphia official), but it might very well ultimately confirm the plaintiffs' evidence that use of the test is not justified by business necessity. Anyone who doubts that these undertakings would result in protracted rounds of discovery, procedural skirmishes, and hearings need look no further than the massive records compiled in *O'Neill* and *Alverez*.

Additional litigation would impose tertiary burdens on the City's ability to conduct the business of government. Until the issuance of a formal court decision concerning the legality of the exam, the City would be forced either to suspend use of the test (and therefore perhaps all police recruit hirings) or else to assume the risk of ever-increasing liability, since each time it administers the challenged exam it creates a new class of potential claimants, many of whom might be entitled to backpay. Also, the City's previous attempt to perform a validation study of the test brought it into conflict with members of the police force, whose cooperation was needed, and their representatives. Nothing at the hearing

suggested that such a breach in relations would not occur again if the City were compelled to commence a validation study under similar circumstances. The Consent Order lifts the City out of these dilemmas and permits it to avoid operating its police force in an uncertain and unstable environment.

Although this case is relatively youthful and discovery has been minimal, counsel are intimately familiar with the *O'Neill* and *Alverez* suits and are cognizant of the relative merits and inadequacies of their clients' positions. From the plaintiffs' perspective, the disparate impact of the test is obvious. The task of identifying and compiling the appropriate statistics that can support court-mandated relief in this evolving area of law, however, is potential daunting. Similarly, the City, which has been down this particular Title VII road on many occasions, is at considerable risk that the Court will conclude that the exam is not sufficiently predictive of relevant work behaviors. That finding would expose the City to backpay liability in addition to perhaps even broader and more inflexible equitable measures than those contained in the decree, with the consequent greater loss of control over its hiring decisions. Yet, the Consent Order obviates the perils and vagaries of litigation by providing the species of relief which is most beneficial to members of the class — correction of the test's adverse impact — and which the City can provide at a low cost. As Judge Fullam noted in *O'Neill*, the "minor potential disruption" in the rank-order eligibility list "seems a small price for the benefits achieved — benefits both to the minority candidates, who have potentially valid claims for significantly greater relief and to white applicants, whose chances for actual hiring . . . will as a practical matter, be improved if the consent decree is signed." 100 F.R.D. at 360. The Consent Order, then, embodies a reasonable and sensible exchange under all the circumstances.

Appendix B

The mild reaction to the proposed Order bolsters the Court's conclusion that it should be approved. Even though the notice of hearing broadly authorized any person "affected" by the decree to comment on it, only one objection, apart from those posited by the FOP, was filed. That lone objection questioned the abstract fairness of race-conscious programs. The other letters that were related to the settlement supported it.

Second, the proffered Consent Decree is not illegal or inequitable. It is structured to address the plain racial imbalance between the relative test performances of black and white applicants. The uncontradicted evidence shows that such a statistically significant imbalance exists, that the test has not been validated, and that there is a substantial question about whether it ever can be validated. As such, the Court concludes that race-conscious measures are warranted to remedy conspicuous racial disparities in the police officer recruit selection process.

Contrary to the argument of the FOP, *Wards Cove* does not condemn the type of statistical data introduced to support the Consent Order. In that case, the plaintiffs challenged, pursuant to Title VII, an array of employment practices in two Alaskan salmon processing businesses. They submitted statistics demonstrating that while a large percentage of nonwhites held the unskilled, low-paying cannery jobs, a meager percentage of nonwhites filled the skilled, high-paying noncannery positions. Stating that "[t]he 'proper comparison [is] between the racial composition of [the at-issue jobs] and the racial composition of the qualified . . . population in the relevant labor market,'" the Supreme Court held that the disparity upon which the complainants relied could not support a prima facie case of discrimination. ____ U.S. at ____, 109 S. Ct. at 2121 (quoting *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308, 97

S. Ct. 2736, 2742, 53 L. Ed. 2d 768 (1977)).

Wards Cove is thus distinguishable. As the decisions in *Johnson, Firefighters, Sheet Metal Workers*, and *Weber* make clear, the requisites of a prima facie Title VII disparate impact claim against an employer are inapposite when the remedial measures in controversy are implemented voluntarily. *See supra* part III.A. Further, even if the propriety of voluntary affirmative action were contingent on the establishment of a prima facie case, *Wards Cove* neither proscribes the utilization of applicant flow data in analyzing jobs that require no special skills or training programs designed to provide expertise, *see Green v. USX Corp.*, 896 F.2d 801, 804-05 (3d Cir.), *cert. denied*, ____ *U.S.* ____, ____ *S. Ct.* ____, ____ *L. Ed. 2d* ____ *(1990), nor purports to disparage the substantial body of precedent which has approved the use of such data in the testing context. See, e.g., Dothard v. Rawlinson*, 433 U.S. 321, 330-31, 97 S. Ct. 2720, 2727-28, 28 53 L Ed 2d 786 (1977); *Albemarle*, 422 U.S. at 425, 95 S. Ct. at 2375; *EEOC v. Greyhound Lines*, 635 F.2d 188, 191 (3d Cir. 1980); 28 C.F.R. § 50.14(16)(B) & (R); Comment, *When Doctrines Collide: Disparate Treatment, Disparate Impact, and Watson v. Forth Worth Bank & Trust*, 137 U. Pa. L. Rev. 1755, 1760 (1989); Waintroob, *The Developing Law of Equal Employment Opportunity at the White Collar and Professional Level*, 21 Wm. & Mary L. Rev. 45, 81-86 (1979).

The FOP also asserts that the contemplated remedial action is unlawful because the statistics do not reveal an adverse impact of sufficient magnitude. The FOP relies on the Uniform Guidelines' "four-fifths" or "eighty percent" rule, which states that

> [a] selection rate for any race . . . which is less

> than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by the Federal enforcement agencies as evidence of adverse impact, while a greater than four fifths rate will generally not be regarded by Federal enforcement agencies as evidence of adverse impact

28 C.F.R. § 50.14(4)(D). Again, because the guideline demarcates the disparity that usually is associated with a prima facie claim of discrimination, the FOP's argument misses the mark. The level of adverse impact needed to justify the voluntary implementation of race-conscious measures is manifest racial imbalance, which requires a lesser showing than that which would create a prima facie case against an employer. The statistics show that the pass rate of blacks is approximately 82% of the pass rate of whites. Even by the FOP's narrow interpretation of the rule that evidence suggests a borderline prima facie disparate impact claim and therefore amply demonstrates the existence of a manifest imbalance. *See Johnson*, 480 U.S. at 633 n.11, 107 S. Ct. at 1453 n.11; *cf. City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 500, 109 S. Ct. 706, 724, 102 L. Ed. 2d 854 (1989).

The Court finds that the means employed to address this imbalance neither unnecessarily trammel the interests of other racial groups nor create an absolute bar to their employment opportunities. First, the interests potentially impaired by the remedial scheme are minimal. Candidates who score well on nonvalidated employment examinations have no legitimate expectation of selection. *See Vulcan Pioneers v. New Jersey Dep't of Civil Serv.*, 832 F.2d 811, 816 (3d Cir. 1987); *Vanguards*, 753 F.2d at 484-85. Moreover, the Consent Order does not divest anyone of a currently held position. A plurality of the Supreme

Court explicitly noted in *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 106 S. Ct. 1842, 90 L. Ed. 2d 260 (1986), that

> [i]n cases involving valid *hiring* goals, the burden to be borne by innocent individuals is diffused to a considerable extent among society generally. Though hiring goals may burden some innocent individuals, they simply do not impose the same kind of injury that layoffs impose. Denial of a future employ ment opportunity is not as intrusive as loss of an existing job.

Id. at 282-83, 106 S. Ct. at 1851.

Second, the interests that prospective applicants do reasonably hold are infringed little. The Consent Order's remedial measures are not activated unless a statistically significant disparity between the performances of black and white test-takers is identified. Even in that situation, the plan does not require the City to select or reject applicants exclusively because of race or hire unqualified blacks for the police officer recruit position, and the degree of correction is directly tied to the scoring disparities between black and white test-takers. There is no question that to cure the effects of prior or present discrimination, innocent parties may be called upon to shoulder some of the onus that a narrowly tailored remedy engenders. *See, e.g., Fullilove v. Klutznick*, 448 U.S. 448, 484, 100 S. Ct. 2758, 2778, 65 L. Ed. 2d 902 (1980) (opinion of Burger, C.J.); *Patterson*, 514 F.2d at 773. Indeed, under the proposed settlement, any possible deprivation is temporally circumscribed. As plaintiffs' counsel stated at the hearing, individuals who are passed over for additional processing because of the Consent Decree's operation will be selected for further consideration during the next round of hirings.

Appendix B

Last, the relief afforded by the Consent Order is of temporary duration. The objective of the plan is not to maintain a racial balance, but to remedy the underrepresentation of blacks in the training program. The Order specifies that its terms will expire in ten years or upon validation of a police officer recruit exam, whichever is earlier. Also, the City must immediately solicit and review proposals for an examination that minimizes or eradicates adverse impact on nonwhites and that can be validated. *See Johnson*, 480 U.S. at 639-40, 107 S. Ct. at 1456; *Weber*, 443 U.S. at 208, 99 S. Ct. at 2729; *Kromnick v. School Dist. of Philadelphia*, 739 F.2d 894, 911 (3d Cir. 1984).

The Court therefore cannot agree with the FOP's generalized contention that the Order discriminates against whites and other racial groups in violation of federal law. The burden of proving that a consent decree suffers from such an infirmity rests on those objecting to court approval of it, see *Johnson*, 480 U.S. at 626, 107 S. Ct. at 1449 (Title VII); *Wygant*, 476 U.S. at 277-78, 106 S. Ct. at 1849 (1986) (plurality opinion) (fourteenth amendment), and the FOP has introduced no evidence to support its assertion. Given the affirmative action dimensions of the *O'Neill* and *Alverez* decrees, one would fully expect that the FOP could have documented such discrimination if it had occurred. Of course, in the event the proposed Consent Order does in fact unfairly impair the rights of other racial groups, adversely affected individuals may petition this Court to modify it. *See Martin v. Wilks*, ____ U.S. ____, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989).

The Court also rejects the FOP's remaining attacks on the settlement. Many of the FOP's claims, such as that test is valid or that the Consent Order is the product of collusion between the plaintiffs and the City, rely on predicate facts not proven. The FOP was afforded every opportunity to substantiate its

allegations, but it declined to do so. The FOP's complaint that the agreement runs afoul with various state and municipal enactments is irrelevant. "[I]t is axiomatic that state laws must fall when they hinder the effectuation of affirmation action decrees, even consent decrees." *Vulcan Pioneers v. New Jersey Dep't of Civil Service*, 588 F. Supp. 727, 731 n.4 (D.N.J. 1984).

The proposed Consent Order is fair, adequate, and reasonable. In consequence, it will be approved.

APPENDIX C — ORDER AND FINAL JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED OCTOBER 16, 1990

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 90-2356

THOMAS FREEMAN, JR., MICHAEL E. JORDAN, RODNEY LADSON, individually and on behalf of all others similarly situated, and THE GUARDIAN CIVIC LEAGUE, INC.

v.

CITY OF PHILADELPHIA, and ORVILLE W. JONES, in his official capacity as the duly appointed PERSONNEL DIRECTOR FOR THE CITY OF PHILADELPHIA, FRATERNAL ORDER OF POLICE, LODGE NO. 5, and JOSEPH CAMPANA

ORDER AND FINAL JUDGMENT

AND NOW, this 16th day of October, 1990, for the reasons stated in this Court's Memorandum of October 16, 1990;

IT IS ORDERED that the proposed Consent Order, which is set forth as an Appendix and made a part of this Order, is APPROVED;

AND IT IS FURTHER ORDERED that, there being no reason for delay, the Clerk of Court is hereby directed, pursuant to Rule 54 of the Federal Rules of CiVil Procedure, to enter this Order as a final judgment in the above-captioned action.

Appendix C

s/ Raymond J. Broderick
RAYMOND J. BRODERICK, J.

Appendix C

APPENDIX — CONSENT ORDER

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

NO. 90-2356

THOMAS FREEMAN, JR., MICHAEL E. JORDAN, RODNEY LADSON, individually and on behalf of all others similarly situated, and THE GUARDIAN CIVIC LEAGUE, INC.

Plaintiffs,

v.

CITY OF PHILADELPHIA

and

ORVILLE W. JONES, in his official capacity as the duly appointed PERSONNEL DIRECTOR For the CITY OF PHILADELPHIA

Defendants.

CONSENT ORDER

WHEREAS, this action was instituted on April 5, 1990 by the above-named plaintiffs, who are Afro-American applicants for the City of Philadelphia civil service position of Police Officer Recruit who took the civil service qualifying written entrance

examination administered by the defendants on December 16, 1989;

AND WHEREAS, subsequent to the defendants' January 12, 1990 certification of an eligibility list based on the December 16 exam, the individually named plaintiffs duly filed charges alleging race discrimination in hiring by the defendants with the U. S. Equal Employment Opportunity Commission (hereinafter "EEOC") and thereafter filed this action seeking class certification and preliminary and permanent injunctive relief (as well as other remedial relief) pursuant to Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e-1 (hereinafter "Title VII"); the Civil Rights Act of 1866, 42 U.S.C. § 1981; and the Civil Rights Act of 1866, 42 U.S.C. § 1981; and the Civil Rights Act of 1871, 42 U.S.C. § 1983;

AND WHEREAS, the plaintiffs' EEOC charges, and the allegations in this action, claim that the defendants are engaging in unlawful race discrimination in hiring by using a written examination for the position of Police Officer Recruit which is not a genuine and reliable predictor of the quality of on-the-job performance in the position and which consistently results in a passing and eligibility rate for Afro-American applicants which is statistically significantly lower than the corresponding rate for white applicants;

AND WHEREAS, plaintiffs contend that the defendants' continuing practice of rejecting (i.e. failing) candidates, or placing them on the eligibility list in order based solely upon scores achieved on a written examination which has not been proven to predict actual job performance, is illegal under federal civil rights laws and should be enjoined;

Appendix C

AND WHEREAS, the parties agree that the City has utilized an exam originally prepared by Educational Testing Services ("ETS") and modified by the City in 1987 and 1989 which has had an adverse impact on Afro-American applicants;

AND WHEREAS, the City again administered an ETS examination in June 1990 and may use it later in 1990 and beyond 1990 if necessary;

AND WHEREAS, ETS is no longer marketing an examination for police applicants;

AND WHEREAS, the ETS exams used in Philadelphia and other cities to date have never been found by a court to be valid predictors of an applicant's ability as a police officer;

AND WHEREAS, the named representative plaintiffs, the plaintiff classes, and the defendants, desirous of avoiding litigation over the issue of the validity of tests to predict the ability of applicants to perform as officers, and desirous of ensuring the promotion of equal opportunities within the Philadelphia Police Department without delaying through litigation the processing of candidates for the position of Police Officer Recruit, hereby agree and consent to the entry of this Order as a final Order with respect to all of the issues raised in the Complaint;

AND WHEREAS, it is agreed that this Order is entered with their consent in full and complete settlement and satisfaction of all issues which were or could have been raised in this litigation and that upon the entry of this Order, and subject to the provisions of this Order, this litigation is terminated with prejudice. Further, the individual plaintiffs agree to withdraw with prejudice their charges filed before the EEOC (Freeman - charge #170900458;

Ladson - charge #170900461; and Jordan charge #170900498);

AND WHEREAS, the Court has determined that this Order is a fair, adequate, and reasonable settlement of this action, and that the obligations imposed upon the defendants by this Decree are proper under law, including 42 U.S.C. §§ 1981, 1983; Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e, *et seq.*; and the Constitutions of the United States and the Commonwealth of Pennsylvania, and that the Order will not result in discrimination under those statutes, and that it is within the Court's equitable powers under those laws;

NOW THEREFORE, this _____ day of _____, 1990, after full hearing and consideration of the matters before the Court, this final Order is hereby DECREED, with the consent of the parties:

I. JURISDICTION

1. This Court has jurisdiction to enter preliminary and permanent injunctive relief pursuant to 42 U.S.C. §§ 1981 and 1983 and 42 U.S.C. § 2000e-5(f)(2). By letter from plaintiffs' counsel to the EEOC dated January 25, 1990 plaintiffs requested that the United States seek preliminary injunctive relief pursuant to Title VII, 42 U.S.C. § 2000e-5(f)(2). To date the United States has not responded or otherwise acted. Thus this Court also has jurisdiction to enter preliminary and/or final injunctive relief under Title VII.

II. ISSUES LITIGATED

2. Nothing in this Consent Decree shall affect, be interpreted as expanding, modifying, or otherwise altering the obligations

of the City of Philadelphia, its officials and employees (hereinafter "City"), insofar and to the extent that any such obligations remain, under the Consent Decrees in *Commonwealth of Pennsylvania, et al. v. O'Neill, et al.*, C.A. No. 70-3500; *Brace v. O'Neill, et al.*, C.A. No. 74-339; *U.S. v. City of Philadelphia*, C.A. No. 74-400; *Sanford, et al. v. O'Neill, et al.*, C.A. No. 78-1154; and *Alvarez; et al. v. City of Philadelphia*, C.A. Nos. 79-375 and 79-1192. Nothing in this decree shall in any manner limit or alter the rights of any persons of any race who passed the December 1989 examination and who have been appointed as Police Officer Recruits.

III. CLASS CERTIFICATION

3. The parties agree to, and pursuant to Rule 23 of the Federal Rules of Civil Procedure the Court hereby certifies, the following plaintiff class:

(a) All Afro-American applicants who were notified that they failed the written examination administered on December 16, 1989 (approximately 470 in number);

(b) All Afro-American applicants who received a passing score on the December 16, 1989 examination but were not selected in the group to be processed for appointment to the first class of Police Officer Recruits because of the use of an eligibility list based on rank order scores on the examination (approximately 1200 in number); and

(c) All Afro-Americans who will take a Police Officer Recruit examiniaion which is scheduled to be given by the defendants in June 1990.

4. With respect to the above class the Court finds, and the parties hereby agreee that (a) the class is so numerous that joinder of all members is impracticable, (b) there are questions of law or fact common to the class, (c) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (d) the representative parties will fairly and adequately protect the interests of the class.

5. With respect to the above class the Court further finds, and the parties hereby agree, that the party which would otherwise oppose the class (the City) can be found to have acted on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; and that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

IV. INJUNCTION

6. The City is hereby enjoined from certifying an eligibility list based on any written examination for the civil service position of Police Officer Recruit (or equivalent entry level position) in which Afro-American applicants have a passing rate which is less than the passing rate of applicants in the racial group having the highest passing rate by a statistically significant amount or in which the percentage of Afro-Americans in the top 1000 on the eligibility list is less than the percentage of Afro-Americans who passed the test by a statistically significant amount, unless; (a) this Court has found after an appropriate hearing that the test and its method of scoring (pass/fail or rank order) has been validly shown to predict performance of applicants as police officers; or (b) the

provisions of paragraph 8 are complied with.

7. Subject to the provisions of paragraph 6, nothing in this Consent Decree, shall limit, or be interpreted as limiting the City's ability to take steps to alter or replace existing written entrance examinations with other examinations which the City deems to be of increased validity. Moreover, nothing in this Consent Decree shall limit, or be interpreted as affecting the City's discretion to alter or replace existing methods of scoring future examinations provided that such steps are intended to assure compliance with paragraph 6.

V. SELECTION OF RECRUITS

8. (a) During the duration of this Consent Order, the appointment of Afro-Americans to the position of Police Officer Recruit (or equivalent entry level position) shall be at least at the same rate as the percentage that Afro-Americans are of test applicants. (Applicants shall hereinafter mean test takers.) That is, for each 100 candidates appointed by the City as Police Officer Recruit, the number of Afro-American appointments shall always equal at least the percentage that Afro-Americans were of all applicants who took the test multiplied by 100.

(b) If the City adopts a process of continuous testing, the appointment rate will be based on the percentage that Afro-American test takers were of all test takers for tests given in the preceding six month period, as reported pursuant to paragraph 18. If either party concludes after six months under this subparagraph that an adjustment is needed so that the appointment rate adequately reflects applicant flow rates, the parties may jointly revise this provision or, if unable to agree, may apply to the Court.

Appendix C

(c) Nothing herein shall preclude the City from placing candidates on each eligibility list by rank order according to their scores, by random selection, or by any other method which it may lawfully pursue; this order shall not be deemed to require pass-fail grading which may be utilized only if in accordance with state law.

(d) If there are insufficient Afro-Americans remaining on an eligibility list to comply with this paragraph, the City shall discontinue use of that list, unless the City chooses to select Afro-Americans from a newly certified list while continuing to use a prior eligibility list for selecting other candidates for the purpose of meeting the requirements of this paragraph 8.

(e) Nothing herein shall be interpreted as guaranteeing or requiring that any particular Afro-American candidates be hired.

VI. INDIVIDUAL RELIEF

9. Plaintiff Michael Jordan, who passed the written examination administered on December 16, 1989, and whose name appears on the current eligibility list ranked at 3481, shall promptly be notified by the City that he will be selected for further screening and processing. Said notice shall include an approximate date upon which plaintiff Jordan can expect to be called for the next screening step.

10. Plaintiffs Freeman and Ladson, who were notified that they failed the written examination administered on December 16, 1989, shall be notified by the City of the next examination date. Prior to that date the City shall offer said plaintiffs an opportunity for an individualized training session.

Appendix C

VII. CLASS RELIEF

11. (a) Those class members who passed the December 16, 1989 or June 1990 examinations shall be selected on the basis of paragraph 8. To the extent any selections for processing have been made from the respective eligibility lists prior to entry of this Order on a basis inconsistent with paragraph 8, future appointments from the June examination list (or a subsequent list if necessary) shall be adjusted so that the overall appointment rate for AfroAmericans shall be in compliance with paragraph 8 no later than when the total number of persons appointed after this Order is entered equals the total number appointed prior to entry of this Order. For the purpose of this paragraph only, the applicant flow rates of paragraph 8 shall be adjusted with respect to the December exam to delete persons of all races who passed the exam and were called for processing but did not report or withdrew from consideration.

(b) All class members who did not pass the December 16, 1989 or June 1990 examinations shall be given notice of the next examination for Police Officer Recruit after this order and the City shall, after appropriate notice, conduct a training session specifically for such class members in a timely fashion prior to that entrance examination.

VIII. DEVELOPMENT OF NEW EXAMINATIONS

12. The City shall publicly solicit proposals for a Police Officer Recruit examination which shall minimize adverse impact on minorities and which shall have been or can be validated. The announcement of such solicitation shall be issued within 45 days of this Order. The Personnel Director shall file a report with the Court within 120 days of receiving the proposals stating his reasons

for selecting or rejecting each of the proposals received. All information available to the City in connection with analyzing the proposals shall be shared with counsel to the parties.

IX. RECRUITMENT AND TRAINING

13. The City shall continue its current efforts to promote the interest, application, and hire of qualified Afro-American candidates for the position of Police Officer Recruit.

14. In order to facilitate and increase the effectiveness of the City's recruitment efforts, during active recruiting periods, the Police Department shall assign Police Officers to perform recruitment duties as their primary function.

15. (a) Until and unless the City shifts to the administration of continuous, rather than periodic civil service written entrance examinations for the position of Police Officer Recruit, the City shall conduct or sponsor at least one (1) training session prior to the date of each examination so that prospective test takers may be assisted in their preparation for such examinations. The City may employ the Guardian Civic League (an association of Afro-American police officers) or an equivalent organization. Plaintiffs shall be notified and consulted about any equivalent organizations to be selected by the City.

(b) If the City utilizes a test for which prior training is inappropriate, the City shall notify plaintiffs and shall not have to conduct or sponsor any training.

16. If the City shifts to the administration of continuous written entrance examinations for the position of Police Officer Recruit, the City shall similarly conduct or sponsor training

sessions on a regularly scheduled, year-round basis.

17. The City shall increase its efforts to locate and encourage Afro-American test takers who pass the written entrance examination for the position of Police Officer Recruit, but who do not report for further screening and processing. As part of these efforts, the City shall cooperate with the Guardian Civic League and equivalent organizations in trying to locate such persons.

X. NOTICE AND REPORTING REQUIREMENTS

18. (a) The City shall advise counsel for the parties 30 days before the announcement of any exam of its intention to hold the exam; the type exam; what organization shall provide the questions or score the exam; the basis for scoring the exam; and any other information which counsel may reasonably request. The City shall provide to counsel to the parties as soon as practicable after the test, but no less than 14 days prior to the date on which names are certified from any eligibility list, the percentage for each race taking the exam, the percentage for each race passing the exam, and the percentage for each race in each 1000 rank order, if applicable. A copy of the final eligibility list shall be provided counsel as soon as it it certified.

(b) Within 30 days of the completion of each calendar quarter ending March 31, June 30, September 30 and December 31 the City shall report the racial composition of all those persons (i) called from the eligibility list for final processing, the racial composition of those persons passed, rejected or held in each stage of the processing, and the race of all appointments to the position of Police Officer Recruit (or equivalent entry level position), the racial composition of each police academy class begun during the

period, the racial composition at the time of graduation during the period.

(c) Any additional information which counsel to the parties may reasonably request in order to ascertain compliance with this Consent Order, including any information concerning any studies conducted to validate any exam.

19. All required notices to counsel shall be sent by first class mail or hand delivered to the offices of the Public Interest Law Center of Philadelphia, 125 South 9th Street, Suite 700, Philadelphia, Pennsylvania 19107, 215-627-7100.

XI. DURATION OF ORDER AND CONTINUING JURISDICTION OF THE COURT

20. (a) The rights and obligations under paragraphs 6, 7 and 8 of this Consent Order shall expire after (i) the City has created an eligibility list for Police Officer Recruit based on an examination in which Afro-American applicants have a passing rate which is not less than the passing rate of applicants in the racial group having the highest passing rate and where the percentage of Afro-Americans in the first 1000 persons on the eligibility list is equal to their percentage on the entire list, or based on an examination which this Court has determined to be a valid predictor of performance as a police officer or (ii) 10 years, whichever is earlier.

(b) The rights and obligations under all other paragraphs shall continue throught the expiration of the next eligibility list created after the termination of this Order under paragraph (a) above.

(c) The Court shall retain jurisdiction to modify, amend,

and enforce this Order and to make a determination upon petition by defendants whether an examination is a valid predictor of performance.

XII. COUNSEL FEES AND COSTS

21. The City shall promptly review and consider requests for statutory attorneys' fees and costs from plaintiffs' counsel upon submission to the City of time/activity entries, hourly rates and other appropriate information. Any disputes may be presented to the Court upon appropriate petition.

XIII. RELEASE

22. For and in consideration of this Consent Order as set forth in the preceding paragraphs, the names plaintiffs and the class they represent, agree and consent to the entry of this Order as a final order with respect to all of the issues in this litigation, and do hereby remise, release, and forever discharge the defendants, their agents, servants, or employees, from any and all liability, actions and causes of actions, claims, and demands whatsoever in law or equity which have heretofore arisen in this action or which could have arisen from this action prior to the date of this Order, including but not limited to challenges as to the legality of the December 16, 1989 entrance examination, to the January 12, 1990 certification of an eligibility list and to the June 1990 examination.

Appendix C

s/ Ralph J. Teti
RALPH J. TETI, ESQUIRE
SUSAN SHINKMAN, ESQUIRE
Chief Deputy, Special
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s/ Frank Finch, III
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Attorneys for Plaintiffs

June _____, 1990

APPROVED and ENTERED this 16th day of October, 1990

s/ Illegible

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED APRIL 16, 1991

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION

No. 90-2356

THOMAS FREEMAN, JR., MICHAEL E. JORDAN, RODNEY LADSON, individually and on behalf of all others similarly, situated and THE GUARDIAN CIVIC LEAGUE, INC.

v.

CITY OF PHILADELPHIA, and ORVILLE W. JONES, in his official capacity as the duly appointed PERSONNEL DIRECTOR FOR THE CITY OF PHILADELPHIA, FRATERNAL ORDER OF POLICE, and JOSEPH CAMPANA

ORDER

AND NOW, this 16th day of April, 1991; Intervenor Fraternal Order of Police having filed a Motion for New Trial and a Motion to Amend this Court's judgment approving the Consent Decree entered into by Plaintiffs and City Defendants, 751 F. Supp. 509; and Intervenor not having raised any legal issues not considered previously by the Court and not having set forth facts which, even if true, are relevant to the findings made by the Court and accordingly would not alter this Court's conclusion that the approved Consent Decree is fair, adequate, reasonable, and lawful;

IT IS ORDERED that Intervenor's Motion to Amend Judgment is DENIED and its Motion for New Trial is DENIED.

Appendix D

s/ Raymond J. Broderick
RAYMOND J. BRODERICK, J.

ENTERED: April 17, 1991

Supreme Court, U.S.
FILED
MAR 27 1992
OFFICE OF THE CLERK

(2)

No. 91-1217

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

FRATERNAL ORDER OF POLICE, LODGE NO. 5,
Petitioner,

v.

CITY OF PHILADELPHIA, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS, THOMAS FREEMAN, JR.; MICHAEL E. JORDAN; RODNEY LADSON; THE GUARDIAN CIVIC LEAGUE, INC.

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March 27, 1992

PACKARD PRESS / LEGAL DIVISION, 1617 JFK BOULEVARD, PHILA., PA. 19103 (215) 563-9000

10

PETITIONER'S QUESTIONS PRESENTED FOR REVIEW

Has the Third Circuit violated this Court's *City of Richmond v. J.A. Croson Co.* ruling by approving a consent decree which:

(a) Imposes a racial hiring quota without adequate proof of discrimination;

(b) Imposes a racial hiring quota despite proof that the challenged practice furthers the employer's legitimate goals, and;

(c) Imposes a racial hiring quota which is not narrowly tailored?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iii
Counterstatement of the Case	1
Summary	2
Reasons for Denying A Writ of Certiorari	3
I. There was abundant and uncontested proof of discrimination by the Philadelphia Police Department's entrance examination	3
II. The Court found that the City's written examination did not predict whether an applicant would be a capable police officer	4
III. The remedy is narrowly tailored to cure the discrimination found	5
Conclusion	6

TABLE OF CITATIONS

Cases Cited: Page

City of Richmond v. J.A. Croson Co.,
488 U.S. 469, 109 S.Ct. 706 (1989)..... 5

United States v. Paradise,
480 U.S. 149, 107 S.Ct. 1053 (1987)..... 6

Other Authorities Cited:

28 C.F.R. §50.14(5)(G)..... 4

28 C.F.R. §50.14(5)(I) 5

No. 91-1217

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

FRATERNAL ORDER OF POLICE, LODGE NO. 5,
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v.

CITY OF PHILADELPHIA, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF RESPONDENTS, THOMAS FREEMAN, JR.; MICHAEL E. JORDAN; RODNEY LADSON; THE GUARDIAN CIVIC LEAGUE, INC.

COUNTERSTATEMENT OF THE CASE

This is a case to halt the use of a written entrance exam by the Philadelphia Police Department for selecting police officers on the grounds that it discriminates against African-American applicants. The original parties, based on extensive prior litigation involving similar tests, agreed to the consent decree set forth in Appendix C to the Petition.

On September 12, 1990 the District Court held an evidentiary hearing on the fairness and legality of the

consent decree. Evidence was presented by the proponents of the decree which included testimony by a statistician on the results of two exams administered by the defendants, by the Philadelphia Police Commissioner, and by the City Personnel Department's head of testing. Petitioners, intervenors below, presented no evidence concerning the tests.

The district court's opinion with its findings of fact and conclusions of law was entered October 16, 1990. It found significant racial disparities in the selection rates of the test (Appendix to the Petition 9a-11a (hereinafter "Appendix"), found no evidence that the test measured performance was presented (Appendix 11a-12a) and found the City's decision not to litigate the validity of the test was made in good faith and was reasonable (Appendix 15a-17a). The court found the decree minimized any impact on non-African-American applicants and was appropriately limited to remedy the unlawful disparities (Appendix 19a-21a). It concluded that the consent decree was fair, reasonable and in compliance with the law.

After issuing its opinion the court provided the intervenor with an additional three months to file briefs on reconsideration. The order was re-affirmed on April 16, 1991. After briefs and oral argument the Court of Appeals for the Third Circuit affirmed *per curiam* (Appendix 1a-2a).

SUMMARY

The premise of the questions presented for review are factually untrue: (1) there was uncontested proof of discrimination by the written tests; (2) there was no proof that the examinations further the employer's legitimate hiring goals of measuring applicants' ability to perform as police officers; and (3) the remedy is narrowly tailored to redress the discrimination in the tests and automatically ends when the discrimination ceases.

REASONS FOR DENYING A WRIT OF CERTIORARI

I. There was abundant and uncontested proof of discrimination by the Philadelphia Police Department's entrance examination.

The plaintiffs introduced evidence through a statistician, and the District Court found (Appendix 10a), that the disparity in pass rates between African-American and White test takers was statistically significant. The uncontradicted testimony was that on the two tests (December 1989 and June 1990) the failure rate for African-Americans was four times higher than for White test takers (21.1 percent versus 5.6 percent) and that this disparity was 15.7 standard deviations from the expected and that the probability that this was due to chance is less than one in ten thousand.

Petitioner's statement that "Under the Uniform Guidelines, . . . there was simply no discriminatory impact" is entirely wrong. The Guidelines, quoted at page 4 of the Petition, does not limit finding discrimination to when the minority selection rate is less than 80% of the white rate, as Petitioner asserts, but also provides:

> "Smaller differences in selection rate may nevertheless constitute adverse impact, where they are significant in both statistical and practical terms. . . ."

As noted, the Court found the disparity was significant in statistical terms, and it was uncontested that it was significant in practical terms since it foreclosed large numbers of black candidates from becoming police officers.

The District Court also found that using the test to establish a rank order increased the disparity to the point where only 11.5% of the top 200 persons on the combined eligibility list were African-American while they were a majority of the persons and were 65 percent of the bottom group of scorers. (Appendix 11a).

The Uniform Guidelines provides:

> "If a user decides to use a selection procedure on a ranking basis, and that method of use has a greater adverse impact than use on an appropriate pass/fail basis . . . the user should have sufficient evidence of validity and utility to support the use on a ranking basis." 28 C.F.R. §50.14(5)(G).

II. The Court found that the City's written examination did not predict whether an applicant would be a capable police officer.

The evidence was uncontested that the City had not conducted any studies which could validate the ability of the examination to predict an applicant's performance as a police officer and that the City did not believe such studies could be made. The Court found that this was a reasonable and good faith judgment on the basis of (a) extensive past experience by the City in litigation related to similar tests, (b) the Justice Department's successful litigation against the use of similar tests by Nassau County, New York and Suffolk County, New York, and (c) because the original developer of this test (Educational Testing Services of Princeton) had informed the City it was no longer marketing the test and was not available to help defend it.

Petitioner suggests that the examination did not have to successfully test for performance as a police officer but only for performance in the five (5) month academy training class. This is erroneous.

First, no evidence was presented to show the examination successfully predicts performance in the academy. The fact that virtually everyone who passes the test succeeds in the academy does not show whether it is under-inclusive by wrongfully rejecting persons who could also succeed. Furthermore, as the trial court noted (Appendix 11a-12a) the Police Commissioner testified that a study of previous exam takers showed that there was no correlation between the rank-order performance and performance at the Police Academy. Once they were

in the Academy, there was no difference in terms of performance there that you could relate to their position on the applicant list.

Secondly, and most importantly, the correct standard is performance as a police officer. The Academy is a temporary position (five (5) months) and the exam is for the purpose of hiring police officers. The Uniform Guidelines 28 C.F.R. §50.14(5)(I) are very clear on this point:

> "If job progression structures are to establish that employees will probably, within a reasonable period of time and in a majority of cases, progress to a higher level, it may be considered that the applicants are being evaluated for a job or jobs at the higher level."

III. The remedy is narrowly tailored to cure the discrimination found.

The remedy objected to addresses only the disparity in the examination selection rates. As long as the exam produces a racial disparity *and* the exam is not shown to be a valid predictor of performance, the disparity is eliminated. That is the only thing the consent decree does. Although the formula in the decree is awkward, its effect is to make the selection rate for African-American candidates and White candidates the same. The selection rate is set by whatever the pass rate is for White candidates.

As soon as the City uses an exam which eliminates the disparity or uses an exam which is a valid predictor of performance, the remedy is itself eliminated. This comports with all case law which requires the remedy to be narrowly directed to the discrimination found.

There is no issue presented here of affirmative action or remedies for persons not directly affected by the discriminatory action, which was the concern in *City of Richmond v. J. A. Croson Co.,* 488 U.S. 469, 109 S.Ct. 706 (1989).

Conversely, the harm to White applicants is minimized because the Consent Decree postpones or delays their hiring but does not require them to be permanently passed over. *United States v. Paradise,* 480 U.S. 149, 107 S.Ct. 1053 (1987).

CONCLUSION

For the foregoing reasons the Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

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March 27, 1992